BRIEF

In Support of Petition for Writ of Certiorari.

I.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was handed down February 11, 1941, and appears in 117 Fed. (2d) 298. The motion for rehearing was overruled March 11, 1941.

II.

JURISDICTION.

1. The statutory provision which we believe sustains the jurisdiction of this Court is Judicial Code, Section 240 (a), amended February 13, 1925 (Chapter 229, Sec. 1), 43 Stat. 438; Sec. 1217 U. S. Compiled Statute Cum. Supp. 1925 (28 U. S. C. A. 347).

2. The date of the judgment to be reviewed is February 11, 1941 (motion for rehearing overruled March 11, 1941).

3. The facts showing jurisdiction have heretofore been set out under "Statement of Matter Involved."

4. The judgment of the Circuit Court of Appeals holding that recovery under the Suicide Statute does not apply to Missouri contracts unless such contracts are made with citizens of Missouri is set out Record pages 71-74, inclusive.

The following decisions sustain the jurisdiction of this Court to review the decision of the Court of Appeals:

Blake v. McClung, 172 U. S. 239, 43 L. Ed. 432;
Chambers v. B. & O. R. R. Co., 207 U. S. 142, 52 L. Ed. 143;
Travis v. Mfg. Co., 252 U S. 60, 64 L. Ed. 460;
Paul v. Virginia, 75 U. S. 168 (8 Wall. 357);
Hague v. C. I. O., 307 U. S. 496, 83 L. Ed. 1423;

Sully v. Bank, 178 U. S. 289, 44 L. Ed. 1072;
Mo. Pac. R. R. v. Clarendon etc. Co., 257 U. S. 533, 66 L. Ed. 354;
Colgate v. Harvey, 296 U. S. 404, 80 L. Ed. 299;
Chalker v. B. etc. R. Co., 249 U. S. 522, 63 L. Ed. 748;
(See also other cases cited under Reasons for Granting the Writ.)

III.

A full statement of the case has been given in the petition under the heading of "Statement of Matter Involved," which, in the interest of brevity, is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals for the Eighth Circuit erred in the following particulars, to wit:

1. In holding that the Missouri Suicide Statute does not apply unless: (a) the contract was executed in Missouri, (b) with a Missouri citizen (R. p. 71).

2. In holding that the assured must be a citizen of Missouri **at the time** the policy is **issued** (R. p. 71).

3. In holding that "the only right, privilege or immunity which it denies is the right to contract that in case of suicide the contract obligation shall not be effective and this denial or abridgment extends only to the citizens of this state and insurers while contracting in this state" (R. p. 72).

4. The Court of Appeals erred in holding (R. p. 74) that Bowen, the assured, was not within the jurisdiction of Mis-

souri at the time of the delivery of the policy to his agent at St. Louis, namely, the United States mail.

5. In holding that the construction as used by the Court of Appeals does not deny to citizens of states other than Missouri any privilege or immunity whatsoever, but that it merely restricts the freedom of its own citizens to contract in Missouri with respect to life insurance (R. p. 72).

6. The Court of Appeals erred in failing to accord the rights of a Missouri citizen to the assured since he resided in Missouri at the time of his death.

SYNOPSIS OF ARGUMENT.

I.

Under the construction of the Court of Appeals, the Missouri citizenship of the applicant, in addition to the consummation of the contract in Missouri, must affirmatively appear to invoke the Suicide Statute. This is contrary to Article IV, Section 2, of the Constitution of the United States, and also is in violation of the Fourteenth Amendment to the said Constitution. It militates against the principles as announced by this Court and other courts.

II.

The statute does not provide for the consummation of contracts in Missouri, but only that the company be doing business in Missouri. It evidently contemplates any life insurance contract, if made with a Missouri citizen, but does not detract from the constitutional provisions under which Missouri contracts must be construed the same way whether the assured is a citizen of Missouri or not. It matters not whether the assured is a citizen at the time the policy is issued, or thereafter becomes a citizen. The public policy of Missouri is declared through the Suicide Statute.

ARGUMENT.

The so-called Suicide Statutes have given rise to many questions. To the best of our knowledge the only states which have suicide statutes at the present time are Missouri, Colorado and Utah. The question here under consideration in this case has undoubtedly arisen before in each of the said states, and will undoubtedly arise many times again. The precise question has not been adjudicated by this Court, but the principle involved has been announced in numerous decisions, some of which we have cited. It is our contention that the Court of Appeals has utterly failed to recognize the constitutional provision involved in Article IV, Section 2, of the Constitution of the United States, and in the Fourteenth Amendment to the said Constitution.

Article IV provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

We shall not undertake to define privileges and immunities. This Court has had before it numerous cases involving the construction of the said section. The question here is: Is there included within the purview of the said section the right to have the same construction placed upon a Missouri contract by a nonresident as that afforded a citizen of Missouri, or, to put it another way, can the courts in Missouri so construe a **Missouri contract** as to mean **one** thing when a **citizen of Missouri** is a party to the contract, and **another thing** when a **non-citizen** of Missouri is a party?

We are not concerned here with a corporation as a citizen since the party involved here is a natural person. Therefore citizens of one state have the right to resort to

the courts of another state equally with the citizens of the latter state.

> Missouri Pacific R. R. Co. v. Clarendon Boat Oar Co., 257 U. S. 533, 66 L. Ed. 354;
> Sheehan v. Lewis (Wis.), 260 N. W. 633.

And so a state statute, the manifest purpose of which is to give all creditors who are citizens of the state priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other states, abridges the rights given by that provision.

> Blake v. McClung, 170 U. S. 247, 43 L. Ed. 432;
> Hague v. C. I. O., 307 U. S. 496, 83 L. Ed. 1423.

Citizens of other states have the same right to sue as citizens of any state.

And by parity of reasoning, the rights which Missouri citizens have in Missouri contracts are identically the same as those which noncitizens or nonresidents of Missouri have in the same or similar Missouri contracts.

> Kelly v. Knott, 163 So. 64, 120 Fla. 580, reversed on other grounds in U. S. v. Knott, 298 U. S. 544, 80 L. Ed. 1321.

Sec. 1 of the Fourteenth Amendment to the Constitution provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We have already indicated that the petitioner is a natural person, therefore a citizen. We have also shown that no state can make or enforce any law which abridges the privileges or immunities of citizens of the United States. State action to which the provisions of the Fourteenth Amendment extends is not limited to legislative enactment as it comes from the hands of the Legislature, but extends to all instrumentalities and agencies employed in the execution of the law, down to the point where the personal and property rights of the citizen are touched.

National etc. R. R. Co. v. Taylor, 86 Fed. 168, modified 88 Fed. 350. Appeal dismissed 20 Sup. Ct. 1022, 44 Law. Ed. 1219.

One of the purposes of the Privileges and Immunities clause in the Fourteenth Amendment was "to bridge the gap left by Article IV so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states."

Colgate v. Harvey, cited supra.

In In re Johnson's Estate, 139 Calif. 532, in discussing Blake v. McClung, supra, the Court holds that if the privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege or immunity is not for that reason declared void, but the protecting arm of the Constitution is thrown around the citizens of every other state, who are thus embraced within the privilege granted. The converse of the proposition is this, that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void.

The due process clause of said Fourteenth Amendment provides:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

Can there be due process of law where the nonresident is portioned out a different kind and type of law than the citizen of the same State under exactly the same circumstances? To ask the question is to answer it. Unjust and arbitrary discrimination cannot be due process. (See cases cited under Reasons for Granting the Writ.)

And then the last clause of the said first section provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. It was this clause that the Court of Appeals in its opinion was fearful of. The Court, quoting from the case of **Lukens v. International Life Ins. Co.**, 269 Mo. 588, 191 S. W. 422, said:

> "A more interesting and difficult question would arise had this contract been executed within this state and while the insured was within the state's jurisdiction, although not one of its citizens. That part of the Federal Constitution which prohibits a state from denying to any person within its jurisdiction the equal protection of its laws would, under such circumstances, become of serious consideration."

The Court of Appeals said that the above language might give it some concern if the insured was within the jurisdiction of the State of Missouri. The Court of Appeals held that the record failed to affirmatively show that the insured was a citizen or within the jurisdiction at the time the policy was executed (R. p. 74). What is meant by the phrase "within the jurisdiction of the State of Missouri"? This is not synonomous with the phrase "within the state." The former phrase has a broader meaning and

connotes the extent of power, while the latter phrase denotes locality.

The word "jurisdiction" in the Suicide Statute is used in its broad sense. Delivery was effected in Missouri to the insured's agent.

> Words & Phrases, Vol. 45, Permanent Edition 45;
> In re Lloyds Estate, 52 Pac. (2d) 1269, 185 Wash. 161.

Furthermore, a life insurance policy is transitory in character and follows the person of the insured. Matters pertaining to the performance of a contract are to be defended under the laws of the place where performance is to be had.

> Martin v. Mut. Life Ins. Co., 190 Mo. App. 703.

CONCLUSION.

It is obvious that the Court of Appeals has misconstrued the Suicide Statute of Missouri. The decision is a very important one. Thousands of contracts of a similar nature are made yearly throughout the United States. The question, therefore, becomes a momentous one and of sufficient importance for this Court, even with its busy docket, to pass upon. If this Court in its judgment sees fit to deny this application for a writ of certiorari the Bowen decision, as announced by the Court of Appeals, stands as the law and will be pointed to as a precedent of the right of a state to so legislate that its own citizens benefit while noncitizens are excluded from participating in such benefits, although the conditions are identically the same. Not only does such a precedent affect insurance questions, but it also affects rights growing out of other contracts and affects various other rights and privileges which should be uniform

throughout these United States. The Suicide Statute is remedial and should be liberally construed.

It is to be noted that the statute does not limit its scope to policies written in Missouri, but is applicable to all policies of insurance on life issued by any company doing business in the state to a citizen of the state not necessarily a citizen at the time of the application, **but at any time.** The assured in this case, as shown by the record, lived in Missouri both before and after the time that he applied for the insurance, and obviously was sent by the company to Centralia, Illinois, to act as its agent, we think it fair to assume temporarily, but whether temporarily or permanently, under the stipulated facts in this case, he was a resident and presumably a citizen of the State of Missouri at the time of his death, and even if this Court were to hold that the Legislature of Missouri can discriminate against noncitizens, Bowen, the assured, was a citizen of Missouri at the time of his death, and since the statute in question is not limited to any particular time, he would come within the purview of its terms. However, we do not believe that this Court will ever hold that the Legislature of Missouri or of any other state has a right to so legislate as to discriminate against noncitizens of such states respectively, in the absence of special circumstances such as have been announced by this Court. Among such cases are those authorizing courts to require nonresidents to deposit costs, etc. The present case has no special circumstances taking it out of the general rule, we contend for.

The record in the case at bar was heard upon a stipulation of facts, and the pleadings. We believe that the decision of the Court of Appeals is in conflict with the decisions that we have heretofore adverted to, and the opinion of the said Court militates against the principles announced by this Court as set out above, and is directly

violative of the above-mentioned constitutional provisions and the Public Policy of the United States as enunciated by its laws.

We earnestly urge upon the Court to grant the writ of certiorari and settle the question, and to reverse the decision of the Court of Appeals.

Respectfully submitted,

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